FILE COPY

Office - Supreme Court, U. S.
FILED
APR 23 1945
CHARLES ELMORE CROPLEY
CLERK

No. 853

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

L. C. AKINS

v.

THE STATE OF TEXAS

On Certiorari from the Court of Criminal Appeals of the State of Texas

BRIEF FOR THE STATE OF TEXAS

GROVER SELLERS
Attorney General of Texas

BENJAMIN T. WOODALL
Assistant Attorney General
ERNEST S. GOENS
State's Attorney

FIRM FOUNDATION—AUSTIN

INDEX

	Page
Preliminary Statement	1
Counterpoints	
First Counterpoint	3
Second Counterpoint	4
Third Counterpoint	4
Argument and Authorities	
(Pertinent to first two counterpoints)	4
(Pertinent to third counterpoint)	27
Conclusion	33

INDEX OF AUTHORITIES

Ah Sin v. Wittman, 198 U. S. 500, 25 S. Ct. 756, 49 L. Ed. 1142	n 8	7
Akens v. State, 145 Tex. Cr. R. 289, 167 S. W. 2d 758	n 1	2
Akins v. State, 182 S. W. 2d 723	n 5	3
	n 19	14

INDEX OF AUTHORITIES—Continued

		Page
American Jurisprudence, vol. 30, p. 807	n 45	30
Bailey v. State of Alabama, 219 U. S. 219, 31 S. Ct. 145, 55 L. Ed. 191	n 8	7
Brown v. State, (Tex. Cr. App.) 181 S. W. 2d 93		29
Chandler v. Chandler, 92 Kan. 355, 140 P. 858, L. R. A. 1916E, 830	n 45	30
Code of Criminal Procedure of Texas—		
Article 333	n 6	5
Article 335	n 6	5
Article 336	n 6	5
Article 338	n 6	5
	n 26	16
Article 339	n 6	5
	n 10	7
	n 23	15

		Page
	n 30	17
	n 32	19
	n 34	19
Article 340	n 6	5
Article 344	n 6	5
Article 349	n 26	16
Cooley's Constitutional Limitations, 8th Ed.—		
Vol. 1, p. 41	n 46	32
Vol. 1, p. 42	n 49	33
Conklin v. State, 144 Tex. Cr. R. 210, 162 S. W. 2d 416	n 30	18
Conklin v. State, 144 Tex. Cr. R. 343, 162 S. W. 2d 973	n 30	18
Constitution of Texas—		
Art. 5, Section 7	n 43	30
Art. 5, Section 11	n 44	30

INDEX OF AUTHORITIES—Continued

		Page
Art. 5, Section 13	n 6	5
	n 22	15
Art. 5, Section 28	n 38	27
	n 42	29
Art. 16, Section 19	n 6	5
Critchlow v. Monson, 102 Utah 378, 131 P. 2d 794	n 45	30
General and Special Laws, 40th Legislature of Texas, Ch. 156, p. 228	n 2	2
48th Legislature of Texas Ch. 22, p. 25	n 3	2
	n 40	28
Glover v. Cobb, 123 S. W. 2d 794 (Tex. Civ. App. writ refused)	n 26	16
Gundling v. City of Chicago, 177 U. S. 183, 20 S. Ct. 633, 44 L. Ed. 725	n 8	7
Harper v. State, 90 Tex. Cr. R. 252, 234 S. W. 909	n 26	16
Hamilton v. State, 141 Tex. Cr. R. 614, 150 S. W. 2d 358, certiorari denied, 314 U. S. 609, 628 S. Ct. 117, 86 L. Ed. 490		21

INDEX OF AUTHORITIES—Continued

		Page
Hill v. State of Texas, 316 U. S. 400, 62 S. Ct. 1159, 86 L. Ed. 1559		8
	n 11	8
	n 24	16
	n 27	17
Jones v. State (Tex. Cr. App.) 181 S. W. 2d 75		28
Kelley v. Edwards, 38 Mich. 210		30
	n 45	30
Lawyer's Reports Annotated, 1916E, 845	n 45	30
Martin v. State of Texas, 200 U. S. 316, 26 S. Ct. 338, 50 L. Ed. 497	n 9	7
	n 36	21
"Negroes in the United States, 1920-1932" Department of Commerce publication	n 28	17
Pierson v. State (Tex. Cr. App.) 178 S. W. 2d 975		28

		Page
Pierre v. State of Louisiana, 306 U. S. 354, 59 S. Ct. 536, 83 L. Ed. 757		22
Population Bulletin, 16th Census, U. S. Department of Commerce	n 25	16
	n 29	17
Revised Civil Statutes of Texas Article 2955	n 30	18
Ruling Case Law, Vol. 27, p. 46	n 47	32
Smith v. Texas, 311 U. S. 128, 61 S. Ct. 164, 85 L. Ed. 84		5
Smith v. State, 144 Tex. Cr. R. 247, 162 S. W. 2d 419	n 30	18
Snowden v. Hughes, 321 U. S. 1, 64 S. Ct. 397		6
	n 7	6
	n 8	7
	n 9	7
	n 18	14
	n 20	14
State v. Pierre, 198 La. 619, 3 So. 2d 895, certiorari denied, 314 U. S. 676, 62 S. Ct. 186, 86 L. Ed. 541		22

AUTHORITIES—Continued

		Page
State v. Stevenson, 89 Ark. 31, 116 S. W. 202	n 45	30
State of North Carolina v. Lewis, 107 N. C. 967, 12 S. E. 457, 11 L.R.A. 105	n 45	30
State of Virginia v. Rives, 100 U. S. 313, 25 L. Ed. 667	n 9	7
Tarrance v. State of Florida, 188 U. S. 519, 23 S. Ct. 402, 47 L. Ed. 572	n 7	6
Texas Almanac, 1943-1944, p. 261	n 31	18
Texas Jurisprudence, Vol. 21. p. 82	n 22	15
Thomas v. State of Texas, 212 U. S. 278, 29 S. Ct. 393, 53 L. Ed. 512	n 9	7
Thompson's Estate, In re 72 Utah 17, 269 P. 103	n 45	30
Uniform Crime Reports for the U. S. and its Possessions, Vol. XV, No. 2, Federal Bureau of Investigation	n 35	19
United States Census, 16th, 1940	n 33	19
Vernon's Annotated Civil Statutes of Texas, Vol. 1, Art. 200a, pocket part, p. 176	n 41	29

LIST OF AUTHORITIES—(Cont'd.)

		Page
Article 2955	n 30	18
Ward & Gow v. Krinsky, 259 U. S. 503, 66 L. Ed. 1033, 42 S .Ct. 529, 28 A. L. R. 1207	n 48	32
Williams v. State of Mississippi, 170 U. S. 213, 18 S. Ct. 583, 42 L. Ed. 1012	n 9	7
Wilson v. State, 117 Tex. Cr. R. 63, 36 S. W. 2d 733	n 22	15

No. 853

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

L. C. AKINS

v.

THE STATE OF TEXAS

On Certiorari from the Court of Criminal Appeals of the State of Texas

BRIEF FOR THE STATE OF TEXAS

PRELIMINARY STATEMENT

Petitioner, L. C. Akins, a colored citizen of Texas, has been twice indicted and tried for the murder of

one V. L. Morris. The first conviction was reversed, and the indictment upon which it was predicated was ordered quashed by the Court of Criminal Appeals of Texas, the state court of last resort having appellate jurisdiction in criminal cases.[1] Upon such action, the original indictment was dismissed, and the instant prosecution instituted through the finding of a new indictment by another grand jury. The grand jury which reindicted Akins had within its membership a member of his race; the first grand jury had no negroes.

Prior to the trial of Akins by petit jury in the instant case, the judge of the Criminal District Court of Dallas County, Texas, died, said court having assumed jurisdiction of the case. Pursuant to section 5 of the Acts of the 40th Legislature, 1927,[2] as amended in 1943,[3] the Presiding Judge of the proper Administrative Judicial District assigned Honorable A. R. Stout, the judge of the District Court of Ellis County, Texas, to preside in the Criminal District Court of Dallas County. Judge Stout presided in said Dallas County court upon the trial of this case.

This court having granted a writ of certiorari, the case is now before it upon three points as urged by

---

[1] Akens v. State, 145 Tex. Cr. R. 289, 167 S. W. 2d 758.

[2] General and Special Laws, 40th Leg., Reg. Sess., ch. 156, p. 228, printed as § 5, Art. 200a, Vernon's Annotated Civil Statutes of Texas.

[3] General and Special Laws, 48th Leg., Reg. Sess., ch. 22, p. 25, printed as § 5, Art. 200a, Vernon's Annotated Civil Statutes of Texas, pocket port.

Petitioner.[4] In substance it is alleged in the first two points that Akins was denied equal protection and due process of law by virtue of discrimination on the part of the jury commissioners drawing the grand jury, resulting in there being *only one negro* on the body presenting the indictment against him.

In the third point urged, it is insisted that Petitioner was tried before an illegal court in that the Texas statute under which Judge Stout presided at his trial contravened the State Constitution, and that he was thereby also deprived of due process of law.

The Texas Court of Criminal Appeals has decided all three points adversely to the contention of Petitioner.[5]

COUNTERPOINTS

FIRST:

The judgments of the Court of Criminal Appeals and of the Criminal District Court of Dallas County, Texas, should be sustained, the evidence and testimony before the trial court not having shown that in the formation of the grand jury that returned the indictment in this case that there was discrimination against the Petitioner or against the negro race;

---

[4] Brief of Petitioner upon his Petition for a Writ of Certiorari, pp. 4-6.

[5] Akins v. State, __ Tex. Cr. R. __, 182 S. W. 2d 723; R. 96, 103.

the Petitioner was therefore not denied the equal protection of the law guaranteed under Section 1 of the Fourteenth Amendment to the Constitution of the United States.

SECOND:

Said judgments should be affirmed, the entire record showing that the refusal to quash the indictment was sustained by evidence and testimony; there being no racial discrimination against Petitioner and his race, he was not deprived of his rights without due process of law in violation of the Fourteenth Amendment to the Constitutiona of the United States, nor in violation of the Fifth Amendment to said Constitution, nor any other section thereof.

THIRD:

There was no violation of due process of law as contemplated by Section 1 of the Fourteenth Amendment to the Constitution of the United States, nor the Fifth Amendment thereto, in the action of Judge A. R. Stout in presiding as the acting judge of the Criminal District Court of Dallas County, Texas, said judge being duly authorized by statutes of the State of Texas to so preside; said statutes having been judicially determined to be valid statutes by the court of last resort in the State.

ARGUMENTS AND AUTHORITIES
(Pertinent to First Two Counter-points)

The Texas method of selection and organization

of grand juries, insofar as is provided by its Constitution and statutes[6] has been declared by this court to be basically legal and fair. Five years ago, in the case of *Smith* v. *Texas*, 311 U. S. 128, 61 S. Ct. 164, 85 L. Ed. 84, it was said:

---

[6]Article 5, Section 13, of the Constitution of Texas provides that a grand jury shall be composed of twelve men but that nine members thereof shall be a quorum to transact business and present bills of indictment.

Article 16, Section 19, of the Texas Constitution provides that the Legislature shall prescribe by law the qualifications of grand jurors.

Article 333 of the Code of Criminal Procedure of Texas provides that the District Judge shall appoint three jury commissioners.

Article 335 of the Code of Criminal Procedure provides that said grand jury commissioners shall appear before the Judge and take an oath that they will not knowingly select a grand juror whom they believe to be unfit or not qualified.

Article 336 of the Code of Criminal Procedure provides that at the time the jury commissioners are sworn in by the Judge he shall instruct them as to their duties.

Article 338 of the Code of Criminal Procedure of Texas provides that the jury commissioners shall select sixteen men from different portions of the county to be summoned as grand jurors for the next term of court.

Article 339 of the Code of Criminal Procedure provides that a grand juror must have certain qualifications (see note 10, infra.)

Article 340 of the Code of Criminal Procedure requires that the list of names selected to serve as grand jurors be sealed in an envelope.

Article 344 of the Code of Criminal Procedure requires the District Clerk to open said envelope thirty days before court meets and make a copy of the grand jury and deliver it to the Sheriff.

It is therefore apparent that every precaution possible has been taken to prevent any discrimination against any class or classes of people in serving on grand juries because of their race or religious creed.

"Here, the Texas statutory scheme is not in itself unfair; it is capable of being carried out with no racial discrimination whatever. * * * "

A comparatively recent reference to the above quotation from the Smith case appears in *Snowden v. Hughes*, 321 U. S. 1, 64 S. Ct. 397, 401, where the citation is used to support the statement that "the denial of equal protection by the exclusion of negroes from a jury may be shown by extrinsic evidence of a purposeful discriminatory administration of *a statute fair on its face.*"

Thus, we begin this argument secure in the knowledge that the laws of Texas are safe from attack, this court having already determined their inherent validity. The sole question in this feature of the case is whether or not the evidence offered on the trial as well as any "extrinsic evidence" shows a "purposeful discriminatory administration" as against Petitioner Akins and the members of the negro race.

In this connection we respectfully invite the attention of this court to its holdings that "a discriminatory purpose *is not presumed*,"[1] but that "there must be a showing of 'clear and intentional discrimina-

[1] Tarrance v. State of Florida, 188 U. S. 519, 520, 23 S. Ct. 402, 403, 47 L. Ed. 572, cited in Snowden v. Hughes, supra.

tion' ";[8] and "*actual discrimination because of race.*"[9]

The 1940 census shows 336,851 white and 61,605 negro population in Dallas County. The Regional Manager of the Western Department of Commerce testified that he was custodian of the census, and gave the above figures, but the witness threw no light upon the number of negroes meeting the statutory qualifications prescribed for grand jurors. He did not know the percentage of property owners; nor how many were qualified to vote; nor how many could read and write, nor how many were above the age of twenty-one years, and who had never been convicted of a felony.[10] (R. 34-35).

Twenty other witnesses were placed under oath in

---

[8]Gundling v. City of Chicago, 177 U. S. 183, 186, 20 S. Ct. 633, 635, 44 L. Ed. 725; see Ah Sin v. Wittman, 198 U. S. 500, 507, 508, 25 S. Ct. 756, 758, 759, 49 L. Ed. 1142; Bailey v. State of Alabama, 219 U. S. 219, 231, 31 S. Ct. 145, 147, 55 L. Ed. 191, all cited in **Snowden v. Hughes**, supra.

[9]State of Virginia v. Rives, 100 U. S. 313, 322, 323, 25 L. Ed. 667; Martin v. State of Texas, 200 U. S. 316, 320, 321, 26 S. Ct. 338, 339, 50 L. Ed. 497; Thomas v. State of Texas, 212 U. S. 278, 282, 29 S. Ct. 393, 394, 53 L. Ed. 512; cf. Williams v. State of Mississippi, 170 U. S. 213, 225, 18 S. Ct. 583, 588, 42 L. Ed. 1012; all cited in **Snowden v. Hughes**, supra.

[10]Article 339, Texas Code of Criminal Procedure prescribes the qualifications of grand jurors, and reads as follows:

"Art. 339. Qualifications

"No person shall be selected or serve as a grand juror who does not possess the following qualifications:

1. He must be a citizens of the State, and of the county in which he is to serve, and qualified under the Constitution and laws to vote in said county; but wherever it shall be made to appear to the court that the requisite number of

an effort to sustain Petitioner's motion to quash the indictment. Without exception, in the testimony of not a single witness, and, as we view it, not in the sum total of the testimony of all twenty-one of the witnesses, is to be found proof of a sufficient number of potentially qualified grand jurors within the negro race in Dallas County to substantiate the alleged race discrimination Petitioner urges as having been practiced against him in this case.

It may be said to fairly appear from the testimony in this case that the opinion of this court in the Hill case [11] created a profound impression upon those charged with the duty of selecting grand jurors in Dallas County. Jury commissioners discontinued their practice of omitting to list negroes for such service. The Hill case was decided on June 1, 1942. As early as the October term, 1942, a negro was drawn, impaneled, and served, and the record discloses that in virtually every term of court since there has been a negro upon each grand jury (R. 25).

True it is that this record reflects that the three jury commissioners acting in their official capacity

---

jurors who have paid their poll taxes can not be found within the county, the court shall not regard the payment of poll taxes as a qualification for service as a juror.

"2. He must be a freeholder within the State, or a householder within the county.

"3. He must be of sound mind and good moral character.

"4. He must be able to read and write.

"5. He must not have been convicted of any felony.

"6. He must not be under indictment or other legal accusation for theft or of any felony."

[11] Hill v. State of Texas, 316 U. S. 400, 62 S. Ct. 1159, 86 L. Ed. 1559, also appealed from Dallas county.

in drawing grand jurors who indicted Petitioner in this case, made a personal investigation by interviewing the negro whom they selected, But there is no suggestion of any nature, either in the record or in the brief of Petitioner, that in so doing, they conducted themselves in any improper manner. In the opinion delivered by the Chief Justice of this court in the Hill case, it is noted that the jury commissioners there concerned "testified that they made no investigation or inquiry to ascertain whether there were negroes in the county qualified for grand jury service." The commissioners in the instant case satisfied themselves by personal observation that C. D. Johnson, the negro, was "thoroughly qualified under the law." Thereupon Johnson was placed upon the grand jury list, qualified, and served. All of the others (the white men) selected upon the jury were personally known to the commissioners, and one of the commissioners testified that they believed all of the grand jurors possessed the essential qualifications required under the Texas law. With reference to the selection of the negro, Johnson, this commissioner said.[13]

> "That is right, we were not doing any more with reference to the negro than by seeing that a negro was on the list of sixteen than the other fifteen members unless we had known them. Judge Adams never mentioned to us about putting one negro on the grand jury, or five or ten. Yes, that there must be representation for the race. *And we could not think of any personally*

[13]Testimony of Ernest R. Tennant, one of the jury commissioners (R. 29).

that possessed the qualification, and, just as suggested, this one, and we all went out and interviewed him. According to his answers, he thoroughly struck us men as being thoroughly qualified under the law, and we put his name on the list." (Italics supplied).

We respectfully submit that this court should read carefully the entire testimony of the three commissioners. Such reading will disclose not only the statements quoted by Petitioner in his brief, but additional ones which we submit will throw a different light upon the matter. For instance, W. H. Wells also testified:[14]

"There was nothing said about the number (of negroes) and nothing was said about the number on the panel. We discussed it quite a bit individually and together that we would have to recommend (negroes) were discussed amongst our acquaintances, and we recommend one up about Carrollton." (Parenthetical insertions ours).

Again, on cross-examination, the witness said:

"Judge Adams did not tell us to put one negro or five negroes on the grand jury. Yes, we just understood to see that negroes had representation on the grand jury, and we went out to see this particular one because we did not know him. I think we found out that he was over age. I did not even know that before. Among the white

[14]Testimony of W. H. Wells, a member of the jury commission R. 26).

people whose names might go on the grand jury unless I knew them personally and knew their qualifications, we went out and talked to them. No, we did not discriminate against a white man or a negro. I attempted not to."

In the testimony of Ernest R. Tennant will be found the following:[15]

"Yes, we complied with the law. In that list there was a negro, one negro. * * * When the grand jury commissioners were appointed by Judge Adams the only thing I remember he said is that we could not discriminate against the negro population being represented on the grand jury. No, he just outlined if he could qualify as a grand juror. In this particular instance we selected one negro on this panel; as far as I am concerned, I read in the paper that the Supreme Court of the United States stated that a negro could sit on the grand jury. * * * We did not then among the commissioners, Mr. Wells, Mr. Douglas and myself, (talk?) about complying with that instruction from the court; we just went straight to get negroes in Dallas County that we could find qualified. * * *." (Parenthetical insertion ours).

With reference to the quotation from Mr. Tennant's testimony as quoted in Petitioner's brief,[16]

---

[15]Testimony of Ernest R. Tenant, a jury commissioner (R. 28).

[16]Brief of Petitioner Under his Petition for a Writ of Certiorari, p. 8: "Ernest R. Tennant testified **'I did not have any intention of putting more than one on the list."**

let us read from the record his entire sentence as it appears therein:

> "I did not have any intention of putting more than one on the list; I could not think of anybody; I would have if I could have thought of another one, and putting one on." (R. 29).

From the testimony of the third member of the jury commission, Roy E. Douglas, we take the following:[17]

> "At that time Judge Adams, the judge of this court made some reference or instructions about how to select the grand jury. He thought it well to select negroes on the grand jury. He said he thought it would be well to select a negro on the grand jury. There was no further discussion about that. We did select a negro on the grand jury."

On cross-examination by the State, the witness said:

> "That is right, we were not instructed by Judge Adams as to what number of negroes, but only to see that the negro race was given representation. We never agreed to select any certain number, but when we found one with all the qualifications of a grand juror we felt like that was satisfactory representation. We made it a point to get sixteen men that we found possessed of the qualifications under the law. No, sir, we did not have in mind to put any set number of representatives of the various races."

[17]Testimony of Roy E. Douglas, one of the jury commissioners (R. 32).

During the course of redirect examination, Mr. Douglas said:

> "No, sir, in that conversation I and the other commissioners had with Judge Adams, *that* was not any reference made as to what the ruling of the Supreme Court was with reference to placing negroes on the grand jury. There was no reference made to that. Yes, I knew about it. I had read about it in the newspapers. *That is the reason we placed this negro on that grand jury, to comply with the ruling of the United States Supreme Court;* and after Judge Adams thought it was advisable to have them on there. We knew, why. No I did not know it was to get around the ruling of the United States Supreme Court; *it was to comply with it.*" (Italics supplied).

On recross-examination by the State, the witness testified:

> "We did not agree to put eleven negroes and one white man on, no. That is right, *all that we were endeavoring to get a fair and impartial grand jury without any discrimination against any race on earth. We did not have in mind*, or the other commissioners *to put any set number on of any race*, white, yellow, or what-not." (Italics supplied).

Can it be said, *as a matter of law*, that in consideration of all the testimony, including that quoted above from the jury commissioners, that the record in this case satisfies the requirement laid down by this court that "there must be a showing of '*clear*

and intentional discrimination'"? Was there *"actual discrimination* because of race"?[18]

It is our sincere belief that upon the whole record, the Texas Court of Criminal Appeals is adequately supported in its conclusion that "we do not think that there was any discrimination shown." In addition, we likewise approve and adhere to the statement of the Presiding Judge of the Court of Criminal Appeals as made on motion for rehearing:

> "On the contrary, the evidence shows an effort on the part of the authorities to comply with the holding of this court and of the Supreme Court of the United States upon the question of discrimination."[19]

As to the "actual discrimination because of race,"[20] regardless of what may be surmised or found as a fact to have been the motives or incitements of the jury commissioners in this case, the truth remains that the colored population was represented on the grand jury. C. D. Johnson, a member of the African race was drawn, impanelled, sworn, and served upon the grand jury which returned the bill of indictment in Petitioner's case.

Let us look to the record evidence, as well as the so called "extrinsic evidence" to see whether the proportion of eleven white men to one negro on said

---

[18] Snowden v. Hughes, supra, notes 8 and 9.

[19] Akins v. State, supra, note 5.

[20] Snowden v. Hughes, supra; also, see cases cited in note 9.

grand jury represented "actual discrimination" in Dallas County.

According to record testimony[21] the 1940 census shows 336,851 white and 61,605 negroes in the county. On a strictly mathematical basis of calculation as to percentage, the 61,605 negroes represent 15.46 per cent of the total population of 398,456; all other races, creeds and colors 84.54 per cent. Only twelve men may serve on any one grand jury.[22] On the basis of exact proportion of population and population only, the racial representation on grand juries should be 1.8552 negro and 10.1448 all others.

Obviously, population is not and cannot be the sole criterion in determining whether the representation of the colored race is adequate. As has been noted,[23] certain qualifications have been set up by statute; for one thing, it is necessary that a Texas grand juror be able to read and write. On this score, while this court has observed that the census of 1930

---

[21] Testimony of Carl F. Barth (R. 34), Regional Manager of the "Western" Department of Commerce.

[22] Constitution of Texas, Art. 5, § 13; Wilson v. State, 117 Tex. Cr. R. 63, 36 S. W. 2d 733.

"This provision has been narrowly construed by the courts, the holdings being uniform to the effect that a body composed of more or less than twelve members cannot constitute a grand jury; that the acts of such a body are nugatory; and that a person held to answer for a crime at its instance is entitled to make objections at any stage of the proceedings." 21 Texas Jurisprudence 82, "Grand Jury" § 4, citing many cases in support.

[23] See Article 339, Texas Code of Criminal Procedure, supra, note 10.

showed "only 7.5 per cent of the negro population of the county to be illiterate,"[24] the percentage of such persons within the native white population as of that census was even less, being only 0.7 per cent.[25] Of a total of the small number of foreign born whites within the county, 7,118 in number, the same census discloses only 350 or 4.9 per cent were illiterate. A combination of the total illiterates of the white race, both native and foreign born whites, shows the percentage of illiteracy in Dallas County to have been exactly .08 per cent of the total of that race. This is in comparison with the rate of "only 7.5 per cent of the negro population of the county."

If we reduce the population totals of each race accordingly, the percentage of representation of negroes eligible by law to serve on a grand jury is likewise reduced.

But, if the basis of grand jury composition is to be determined by a mathematical formula, women of both races must be eliminated, since all women are barred from either grand or petit jury service by provisions of the Texas Constitution and statutes.[26] The same census cited by the Chief Justice

---

[24] Hill v. Texas, supra, 316 U. S. 400, 403, 62 S. Ct. 1159, 1161, 86 L. Ed. 1559, 1562.

[25] From "Population Bulletin, Second Series, Texas, Composition and Characteristics of the Population, 15th Census," a United States Department of Commerce publication.

[26] Article 5, § 13, Constitution of Texas; Articles 338, 349, Code of Criminal Procedure of Texas. See Harper v. State, 90 Tex. Cr. R. 252, 234 S. W. 909; Glover v. Cobb (Tex. Civ. App., writ of error refused, Tex. Sup. Ct.) 123 S. W. 2d 794.

of this court in the Hill case[27] shows that of a total negro population of Dallas County, there were 25,-29 females, 22,589 males.[28]

The same census gives a total of 14,894 negro males of the age of 21 years and over, as contrasted with 86,091 of all others, the latter total embracing native whites of both native, foreign or mixed parentage, foreign born whites, naturalized and alien.[29] This would be 14.75 per cent for negroes, 85.25 for all others, or applied to a grand jury of twelve would entitle the negro to 1.77 men on the jury as against 10.23 whites.

The only reference in the record in this case as to the number of colored citizens who had paid their poll taxes,[30] thus qualifying them as potential jurors, is in the testimony of J. F. Jones (R. 41). His statement is that "about six thousand of them paid their poll tax in 1942." Of that number, the witness did not know how many were males. He estimated that there were "about 200 exemptions in that number." We know of no "extraneous evidence" accurately

---

[27]Hill v. State of Texas, supra; see note 24.

[28]From "Negroes in the United States, 1920-1932," U. S. Department of Commerce, Bureau of the Census publication.

[29]From "Population Bulletin," U. S. Department of Commerce Bulletin, supra, note 25.

[30]The statute defining the qualifications of a grand juror requires that one selected must be "qualified under the Constitution and laws to vote in said county." Art. 339, C. C. P., supra, note 10.

Texas is one of the states where a poll tax is required as

portraying the true picture as to the number of white and colored paying such taxes.[31]

Nor do we have available any statistics as to the proportionate number of those of each race who are "freeholders within the State" or "householders

---

a qualification for voting. Such a tax must be paid by all except those over the age of 60, or otherwise exempt by law from the payment thereof. Constitution of Texas, article 6, § 2; Revised Civil Statutes of Texas, article 2955, et seq.; Vernon's Annotated Civil Statutes of Texas, article 2955 et seq., and many cases cited thereunder.

The grand jury statute (Art. 339, C. C. P., supra, note 10) makes provision for the selection of persons who have not paid such poll tax only "if it shall be made to appear to the court that the requisite number of jurors who have paid their poll taxes can not be found in the county."

In the case of **Conklin v. State**, 144 Tex. Cr. R. 210, 162 S. W. 2d 416, and followed in the cases of **Smith v. State**, 144 Tex. Cr. R. 247, 162 S. W. 2d 419 and **Conklin v. State**, 144 Tex. Cr. R. 343, 162 S. W. 2d 973, in reversing a conviction the Court of Criminal Appeals held that a court may use as grand jurors only citizens who have paid their poll taxes or were exempt from paying it, unless it appeared that there were not enough citizens so qualified within the county to constitute such grand jury.

[31] In 1942, the total poll tax payments in Dallas County of all races aggregated 50,215, but there appears to be no statistical break-down as to races. Texas Almanac, 1943-1944 at p. 261. According to that publication the table showing poll tax payments in the 254 Texas counties was made up from records of the State Comptroller of Public Accounts. It is said: "Number of exemptions issued to those 60 years old and more is not shown since registration is not compulsory except in cities of 10,000 or more population. An estimate may be made by adding 15 per cent to the total of receipts, though this is not in all instances a reliable method."

within the county.[32] Some information may be gained upon this important requisite, however, by consideration of the figures of the 1940 census which disclose that of a total of 44,604 owner-occupied dwellings in Dallas County, the classification is "White, 41,051; Negro, 3,542; Other non-white 11."[33]

As to the requirement of the statute that a prospective grand juror "must not have been convicted of any felony," [34] we again must admit that we have been unable to find competent statistics. The Federal Bureau of Investigation of the United States Department of Justice places the number of murder and non-negligent manslaughter cases in Dallas, Texas, from January to December, 1944, at 72.[35]

We believe the above to be sufficient for population statistics and mathematical gymnastics. Suffice

---

[32] Article 339, Code of Criminal Procedure, note 10, supra. "He must be a freeholder within the State, or a householder within the county."

[33] Source: 16th Census of the United States, 1940. "Housing —Second Series—General Characteristics—Texas." Prepared under supervision of Dr. Leon E. Truesdell, Chief Statistician for Population, Bureau of the Census, Department of Commerce, Washington, D. C.

[34] Article 339, Code of Criminal Procedure, note 10, supra. "He must not have been convicted of any felony."

[35] "Uniform Crime Reports for the United States and its Possessions," Vol. XV, No. 2, Annual Bulletin, 1944. The F. B. I. does not show racial characteristics of criminals in this report, but the Dallas Morning News of February 13, 1945, carries a feature article regarding 59 negro murder cases in Dallas in 1944.

it to say here that if it be contended that the representation of negroes upon a grand jury should conform to exact percentages, calculated upon the basis of the proportion of whites and negroes available and qualified under the law for such service, who can gainsay, that under the facts in this case, the selection of one negro grand juror would meet that test? No source of information is shown to have been available to the commissioners which *would disclose even an approximation of the number of negroes or whites in Dallas County so qualified and in fact no such information appears to be available.* In making their selection, then, the Commissioners were limited to persons known by them to be qualified or those disclosed to be qualified after personal investigation and inquiry. Lacking knowledge on the point, any attempt by the Commissioners to establish proportional representation would be, at most, a rough guess. We think it has been demonstrated above, that whatever the exact proportion of qualified negroes to whites might be, that the proportion of qualified negroes must certainly fall below any calculation based on population alone. Who can say that the selection of one negro grand juror did not more than meet any test of proportional representation? *Certainly it cannot be said that there was "actual discrimination" in this case!*

Considerations, such as required by the statute may just as well be presumed to have been in the minds of the jury commissioners, rather than the presumption of a sinister motive of racial discrimi-

nation. On at least two occasions, this court has said.[36]

> "It may be that the jury commissioners did not give the negro race a full pro rata with the white race in the selection of the grand and petit jurors in this case; still this would not be evidence of discrimination. If they fairly and honestly endeavored to discharge their duty, and *did not in fact discriminate* against the negro race in the selection of the jury lists, then the Constitution of the United States has not been violated. * * * " (Italics supplied).

In the case of *Hamilton* v. *State*, 141 Tex. Cr. R. 614, 150 S. W. 2d 395, certiorari denied 314 U. S. 609, 62, S. Ct. 117, 86 L. Ed. 490, the Court of Criminal Appeals had this to say:

> "We fear that the adoption of a rule that would require a pro rata representation between the white and colored races would result in an admixture of races to meet the possible objections of men of the different races that go to make up the melting pot from which comes the typical American citizen to such an extent that no trial court could give adequate representation to each race in the selection of either commissioners or jurors, and this would especially be so relative to criminal happenings that might take place between the selection of a grand jury list and the empaneling of such grand jury. To deliberately select persons of different races

[36]Thomas v. Texas, 212 U. S. 278, 29 S. Ct. 393, 394, 53 L. Ed. 512, quoting with approval from Martin v. Texas, 200 U. S. 316, 26 S. Ct. 338, 50 L. Ed. 497.

merely because of such difference might assume a discriminatory attitude in favor of such selected persons, and such suggested remedy would amount to a curative for a fancied evil by the use of another evil."

One of the most often cited cases that has been decided by the Supreme Court of the United States on the question of racial discrimination is that of *Pierre* v. *State of Louisiana*, 306 U. S. 354, 59 S. Ct. 536, 83 L. Ed. 757. The reversal of the lower court was ordered in the Supreme Court for the reason that members of the negro race had been systematically excluded from the general venire from which was drawn the grand jury that returned the indictment against Pierre for the murder of a white man, in contravention of the due process clause of the Constitution of the United States.

Following the decision of this court, the defendant, Pierre, was indicted on three additional occasions. Twice the trial court quashed said indictments, but finally the conviction was allowed to stand in the trial court. On appeal to the Supreme Court of Louisiana, that court affirmed the conviction. The opinion is found in *State* v. *Pierre*, 198 La. 619, 3 So. 2d 895, *certiorari denied*, 314 U. S. 676, 62 S. Ct. 186, 86 L. Ed. 541.

Because we feel that the principles of law are so well stated by the Supreme Court of Louisiana, and that while the applicable facts are not exactly the same as in the instant case, the precedent is of value, we quote from the opinion:

"It is counsel's contention that the Jury Commission, in placing only 52 negroes on the general venire list of 300, did not give Pierre the proper *percentage* of representation on the list, directly contrary to the finding of the United States Supreme Court that 49.3 per cent of the population of St. John the Baptist Parish are negroes qualified to serve as jurors.

"In disposing of this issue the trial judge very aptly pointed out that 'There is no law in this State which fixes any proportion or percentage of whites and negroes for jury service, and the Supreme Court of the United States has never held that negroes are entitled to representation on Grand and petit jurors, in proportion to the population as fixed by the preceding census of the United States.'

"The Supreme Court of the United States has held that 'Whenever by any action of a state, whether through its Legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States. * * * ' Norris v. Alabama, supra (294 U. S. 587, 55 S. Ct. 580, 79 L. Ed. 1074), 'But that rule does not entitle a person to be tried by a jury composed only of white, or only of black, or mixed persons, and while it is true that there must be no distinction in selecting the jury based on race or color, the jury commission should select persons whom they know to be competent, regardless of wheth-

er they are white or black, and if all but a few of the persons placed on the general venire list happen to be white, it will be presumed, in the absence of evidence to the contrary, that the list was so selected by the jury commission in a fair effort to select the best qualified persons and not with any view of discrimination on account of race or color.' State v. Gill, 186 La. 339, 172 So. 412, 415. See, also, State v. Turner, 133 La. 555, 63 So. 169; Commonwealth of Virginia v. Rives, 100 U. S. 313, 332, 25 L. Ed. 667; and Neal v. Delaware, 103 U. S. 370, 394, 26 L. Ed. 567.

"In the Rives case the defendant sought to have his case removed to the Circuit Court of the United States for the Western District of Virginia because of the state court's refusal to so modify the jury venire, which was composed entirely of white persons, as to allow that one-third thereof be composed of colored men. In disposing of that issue the Supreme Court of the United States said (100 U. S. 322, 25 L. Ed. 667): '* * * the refusal of the court and of the counsel for the prosecution to allow a modification of the venire, by which one-third of the jury, or a portion of it, should be composed of persons of the petitioner's own race (does not) amount to any denial of a right secured to them by any law providing for the equal civil rights of citizens of the United States. *The privilege for which they moved*, and which they also asked from the prosecution, *was not a right given or secured to them, or to any person, by the law of the State, or by any act of Congress, or by the Fourteenth Amendment of the Constitution.* It is a right to which every colored man is entitled, that, in the selection of jurors to pass upon his life, liberty,

or property, there shall be no exclusion of his race, and no discrimination against them because of their color. But this is a different thing from the right which it is asserted was denied to the petitioners by the State court, viz. a right to have the jury composed in part of colored men. *A mixed jury in a particular case is not essential to the equal protection of the laws, and the right to it is not given by any law of Virginia, or by any Federal statute. It is not, therefore, guaranteed by the Fourteenth Amendment* * * *' (Italics and brackets ours).

"In the later case of Neal v. Delaware, supra, the Supreme Court of the United States said: 'We repeat what was said in that case (Commonwealth of Virginia v. Rives), that while a colored citizen, party to a trial involving his life, liberty, or property, cannot claim, as matter of right, that his race shall have a representation on the jury, and while a mixed jury, in a particular case, is not within the meaning of the Constitution, always or absolutely necessary to the equal protection of the laws, it is a right to which he is entitled, 'that in the selection of jurors to pass upon his life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them, because of their color.' (Brackets ours).

"It is true that in the Pierre case the United States Supreme Court did point out the percentage of negroes living in St. John the Baptist Parish (49.3 per cent), and the percentage of those who could read and write, but the court did not hold, as contended by counsel for defendant, that the defendant is entitled to be tried by a jury composed of any fixed percentage of

negroes. * * * " (Italics throughout by the court).

Under the Texas statutes governing the selection of grand jurors, it will be noted that not every male person above the age of 21 years, who is qualified to vote, who can read and write, and is a householder in the county or a freeholder in the State, is to be considered a qualified grand juror. He must also be a person of sound mind and good moral character. He must never have been convicted of a felony, and he must not be under accusation of theft or any felony.

Much of the determination of the fitness of a prospective grand juror must, of necessity, be left to sound discretion of the jury commissioners, especially as relates to the "good moral character" of said juror. Under the statutory oath[37] each commissioner binds himself that he will "not knowingly elect any man as juryman" whom he believes "*to be unfit and not qualified.*"

Despite the insistence of Petitioner that the testimony of the three commissioners drawing the grand jury in his case, is conclusive of racial discrimination, we most respectfully, and with equal fervor, insist that while it may be conceded that none of the three intended to place more than one negro upon the grand jury drawn by them, there is nothing to prove that such intention was because of racial prejudice

---

[37] Article 335, Code of Criminal Procedure of Texas.

or discrimination against the colored race. We submit that their testimony is entitled to due faith and credit when they declare otherwise.

ARGUMENT AND AUTHORITIES
(Pertinent to Third Counterpoint)

Judge A. R. Stout, District Judge of the 40th Judicial District Court of Texas presided at the trial of Petitioner, although the trial was held in the Criminal District Court of Dallas County. Judge Grover C. Adams, who had been the regularly elected, qualified and acting judge of the Dallas court died prior to the trial of Akins. The Governor of Texas, although vested with the duty, power and authority to do so by express provision of the State Constitution,[38] had not, at the time of the trial, appointed a successor to Judge Adams.

Judge Stout presided upon the trial by virtue of an assignment made by the Presiding Judge of the First Administrative Judicial District of Texas. This was specifically provided for by Legislative enactment. By amendment of the Acts of the 40th Legislature,[39] the 48th Legislature passed the following

[38]Article 5, § 28, Constitution of Texas: "Vacancies in the office of Judges of the Supreme Court, the Court of Criminal Appeals, the Court of Civil Appeals and District Courts shall be filled by the Governor until the next succeeding general election."

[39]General and Special Laws, 40th Leg., Reg. Sess., ch. 156, p. 228, also printed as § 5, Art. 200a, Vernon's Annotated Civil Statutes of Texas.

statute, which was *approved by the Governor* and became effective on February 17, 1943.[40]

> "Assignment of judges; vacancy in office
> "Judges may be assigned in the manner herein provided for the holding of District Court when the regular Judge thereof is absent or is from any cause disabled or disqualified from presiding, and in instances where the regular District Judge is present or himself trying cases where authorized or permitted by the Constitution and laws of the State; and Judge may also be assigned in the manner herein provided for the holding of a District Court, when by reason of the death, resignation, or from any cause whatsoever, the office of District Judge of the District is or has become vacant."

The contention of Petitioner is that the above act is void because it is in conflict with the Constitution of Texas, and therefore Judge Stout was not authorized to act as trial judge. This, it is averred, deprived the Petitioner of his legal rights in violation of the due process clause of the Federal Constitution.

The Texas Court of Criminal Appeals has sustained the validity of the statute under which Judge Stout was acting in at least four cases prior to this one: *Pierson* v. *State* (Tex. Cr. App.) 178 S. W. 2d 975, followed in *Fuller* v. *State* (Tex. Cr. App.) 180 S. W. 2d 361, *Jones* v. *State* (Tex. Cr. App.) 181 S.

---

[40]General and Special Laws, 48th Leg., Reg. Sess. ch. 22, p. 25, printed as § 5, Art. 200a, Vernon's Annotated Civil Statutes of Texas, pocket part.

W. 2d 75, and *Brown* v. *State*, (Tex. Cr. App.) 181 S. W. 2d 93.

The holding in the Pierson case, followed by the other cases cited above, may be summarized for the purposes of this brief. As stated in the notes to Vernon's Annotated Civil Statutes of Texas:[41]

> "The Legislature, under the Constitution to create District Courts, has the exclusive power to destroy the courts, and has power to pass laws to prevent the governor from indirectly destroying the courts by failing to appoint a successor to a deceased district court judge as authorized by the Constitution, and this article, as amended in 1943 providing for the assignment of judges to another district court, where a vacancy occurs by reason of the death of the incumbent, is valid."

The holding of the court in the Pierson case, supra, refutes the argument that the expression of the Constitution providing for the filling of vacancies through appointment by the Governor, is exclusive,[42] by taking into consideration other requirements of the organic law. For instance, it is provided that "The Legislature shall also provide for the holding of District Court when the judge thereof is absent, or is from any cause disabled or disqualified from

---

[41] Vernon's Annotated Civil Statutes of Texas, Vol. 1, Art. 200a, cumulative pocket part p. 176.

[42] Art. 5, § 28, Constitution of Texas; see note 34, supra.

presiding.[43] Another section was likewise considered pertinent:[44]

> "And the District Judges may exchange districts, or hold courts for each other when they may deem it expedient, and shall do so when required by law. This disqualification of judges of inferior tribunals shall be remedied and vacancies in their offices filled as may be prescribed by law."

In its opinion in the Pierson case, supra, the Texas court announced no new rule. As long ago as 1878 in the case of *Kelley* v. *Edwards*, 38 Mich. 210, an act of the legislature was sustained which provided that the circuit court commissioner should act as judge of probate when no successor had been elected or appointed, although the Michigan constitution declared that a vacancy in the office should be filled by appointment of the Governor. The court said inter alia:[45]

---

[43] Art. 5, § 7, Constitution of Texas.

[44] Art. 5, § 11, Constitution of Texas.

[45] Quoted from L. R. A. 1916E 845. See also, 30 Am. Jur. 807, § 103, "Special and Substitute Judges"; Chandler v. Chandler, 92 Kan. 353, 140 P. 858, L. R. A. 1916E 830, headnote 2:

"The requirements of the Constitution that provision be made by law for the selection by the bar of a pro tem. judge when the regular judge is absent or disqualified does not preclude the legislature from providing other methods of selection." Cf: State v. Stevenson, 89 Ark. 31, 116 S. W. 202; State of North Carolina v. Lewis, 107 N. C. 967, 12 S. E. 457, 11 L. R. A. 105; In re Thompson's Estate, 72 Utah 17, 269 P. 103, 128, citing Kelley v. Edwards, supra; Critchlow v. Monson, 102 Utah 378, 131 P. 2d 794, 800.

"It will be observed that this section of the Constitution makes provision for filling the office with some degree of permanency when there is a vacancy, but does not provide at all for those temporary emergencies which occur when the judge happens to be disqualified by interest or relationship or the like, or when he is sick or absent. The occasions are numerous when the service of a judge is indispensable and urgent and no vacancy exists, and yet he is either disqualified or so situated that he cannot act. It is likewise manifest that many cases are likely to occur of actual vacancy by death, removal or resignation, and where it is in the highest degree important that someone shall be found authorized to step in and act without any delay until an appointment or election, in order to satisfy all necessary calls which may be made from day to day on the jurisdiction, and also to preserve unbroken the continuity of pending proceedings. These emergencies were not, in my judgment, intended to be provided for directly by the Constitution, but were left to be legitimately provided for by wisdom of the legislature."

Thus, we are confident in our belief that upon the merits of this question this court will sustain the Texas court in holding the act under consideration to be valid and constitutional. We submit that the law has been correctly decided and applied in the Pierson case, and that Texas follows the weight of authority of cases from other jurisdictions. The constitutional provision empowering the Governor of Texas to appoint a District Judge in the event of vacancy in the office does not preclude the Texas Legislature from providing a means of carrying on

the business of the court through the assignment of other competent judges during the interim following the vacancy, and prior to the making of a permanent appointment to the office.

In any event, under the fundamental and well known rules and principles of law enunciated by this court in a long list of decisions, the Texas court's holding in the Pierson case, supra, should be upheld. "The decision of the State court, that a State statute has been enacted in accordance with the State constitution, is binding on the Federal Courts."[46] In the case of *Ward & Gow* v. *Krinsky*, 259 U. S. 503, 66 L. Ed. 1033, 42 S. Ct. 529, 28 A. L. R. 1207, as in many others, the rule is stated in the syllabus:

> "In the exercise of the appellate jurisdiction of the Federal Supreme Court over State courts, the former court is bound by the construction of a State law adopted by the State court of last resort."[47]

And this is true even though the Supreme Court is not concluded by the *reasoning* of the State court; it is nevertheless bound by the *construction*.[48] "It is, of course, immaterial that the court may still be of opinion that the State court has erred, or that the

---

[46]Cooley's Constitutional Limitations, 8th Ed., Vol. 1, p. 41, citing many cases.

[47]"A decision of a state court of last resort that a state law is not in conflict with the state constitution is binding on the federal courts. * * * "—27 Ruling Case Law, 46, § 51.

[48]Ward & Gow v. Krinsky, supra. Many other cases to the same effect are cited in Cooley's Constitutional Limitations, supra.

decisions elsewhere are different. *Bell* v. *Morrison*, 1 Pet. 351, 7 L. Ed. 174."[49]

Certainly the Petitioner herein was not deprived of due process of law by virtue of Judge Stout having presided at his trial. The question is simply one of determination of whether a state statute conflicts with the Constitution of Texas; out of state authorities support the Texas version, and regardless of that, the Texas court of last resort has decided the question adversely to him. Under all the authorities we have been able to find, this ends the matter.

CONCLUSION

Although we have attempted to carefully answer the contentions of Petitioner upon the third point as urged by him when he sought his court's writ of certiorari, we firmly believe that the basis of his hope for reversal rests upon the question of racial discrimination as presented in his first two points. We likewise believe that this court granted the writ upon that feature of the case.

We are convinced that the true state of the record calls for affirmance of the Texas courts. There is here no question of "exclusion" of colored citizens, for a person of African descent served upon the grand jury which indicted Akins. The trial judge

---

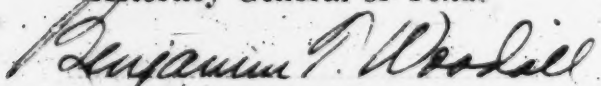
[49]Cooley's Constitutional Limitations, supra, note 42, at p. 42.

who died before the instant trial, but who impanelled and instructed the jury commission, carefully urged them to provide adequate representation for all races. His appointees appear to have made a fair investigation, and as a result we submit that they met the demands of the law. We have found no evidence, nor do we think this court will find evidence to support the implication made by Petitioner that the procedure followed comes within the condemnation of this court of being "a thin veneer of compliance." Instead, we submit with all humility that there was an abundance of caution exercised by those charged with the administration of justice to see that the principles enunciated in former opinions of this great court were scrupulously observed.

WHEREFORE, the State of Texas prays that the judgment of the Court of Criminal Appeals of Texas be in all things affirmed.

Respectfully submitted,

GROVER SELLERS
Attorney General of Texas



BENJAMIN T. WOODALL
Assistant Attorney General

ERNEST S. GOENS
State's Attorney

Copies of this brief have been furnished counsel for Petitioner.

Benjamin T. Woodall

BENJAMIN T. WOODALL
Assistant Attorney General

SUPREME COURT OF THE UNITED STATES.

No. 853.—October Term, 1944.

L. C. Akins, Petitioner, vs. The State of Texas. } On Writ of Certiorari to the Court of Criminal Appeals of the State of Texas.

[June 4, 1945.]

Mr. Justice Reed delivered the opinion of the Court.

This certiorari brings here for review a judgment of the Criminal District Court of Dallas County, Texas, sentencing petitioner to execution on a jury verdict which found petitioner guilty of murder with malice and assessed the penalty at death.

Certiorari was sought to the Court of Criminal Appeals of the State of Texas, which had affirmed the judgment, on a petition which claimed discrimination on account of his race, against the petitioner, who is a Negro, under the equal protection and due process clauses of the Fourteenth Amendment of the Constitution of the United States.[1] Certiorari was allowed because of the im-

[1] Certiorari was allowed also for alleged denial of due process under the Fourteenth Amendment because of the manner in which the trial judge was designated to conduct the trial court. He acted by assignment of the presiding judge of the First Administrative Judicial District of Texas under General and Special Laws, 48th Leg. Reg. Sess., p. 25 (Vernon's Annotated Civil Statutes, Texas, Art. 200a, §.5) instead of by appointment by the Governor under Section 28, Article 5, of the Constitution of Texas, to fill the vacancy caused by the death of the regularly chosen occupant.

The legality of the assignment depends upon the validity of the provisions of the state statute as tested by the Texas Constitution. The constitutional requirement is that vacancies in the office of judges shall be filled by the Governor. The Texas statute provided for assignment of other judges for the work of the court. This statute was interpreted by the Court of Criminal Appeals to provide merely for the functioning of courts under assigned judges, who did not qualify as successors to decedent judges, until the vacancy was filled by appointment or election. The court upheld the constitutionality of the statute. Pierson v. State, 177 S. W. 2d 975; Fuller v. State, 180 S. W. 2d 361; Jones v. State, 181 S. W. 2d 75; Brown v. State, 181 S. W. 2d 93; Akins v. State, 182 S. W. 2d 723. Whether the state rule is expressed in constitution, statute or decision, or partly in one and partly in another, the state's power is to be viewed as a totality. In the absence of a violation of fundamental principle of justice, a state's determination is conclusive upon the federal courts as to the meaning of the state law, so far as any federal question is concerned. Hebert v. Louisiana, 272 U. S. 312, 316; Gregg Dyeing Co. v. Query, 286 U. S. 472, 479-80; United Gas Co. v. Texas, 303 U. S. 123, 141-42. We find no violation of any of petitioner's federal rights in Texas' decision upon the legality of the organization of the court which tried petitioner.

portance in the administration of criminal justice of the alleged racial discrimination which was relied upon to support the claim of violation of constitutional rights. 324 U. S. —. This discrimination was said to consist of an arbitrary and purposeful limitation by the Grand Jury Commissioners of the number of Negroes to one who was to be placed upon the grand jury panel of sixteen for the term of court at which the indictment against petitioner was found. This is petitioner's only complaint as to racial discrimination. No other errors in the proceedings are pointed out.

The Fourteenth Amendment forbids any discrimination against a race in the selection of a grand jury.[2] *Neal* v. *Delaware*, 103 U. S. 370, 394; *Pierre* v. *Louisiana*, 306 U. S. 354, 356; *Smith* v. *Texas*, 311 U. S. 128; *Hill* v. *Texas*, 316 U. S. 400. The burden is, of course, upon the defendant to establish the discrimination. *Tarrance* v. *Florida*, 188 U. S. 519, 520; *Martin* v. *Texas*, 200 U. S. 316; *Norris* v. *Alabama*, 294 U. S. 587, 590. An allegation of discriminatory practices in selecting a grand jury panel challenges an essential element of proper judicial procedure—the requirement of fairness on the part of the judicial arm of government in dealing with persons charged with criminal offenses. It cannot lightly be concluded that officers of the courts disregard this accepted standard of justice.

The order overruling the motion to quash the indictment was made after evidence and without opinion. That motion set out the alleged purposeful limitation on racial representation which is pressed here. The Court of Criminal Appeals, however, without a written analysis of the testimony, said in an opinion that it failed "to find any evidence of discrimination. On the contrary the evidence shows an effort on the part of the authorities to comply with the holding of this court and of the Supreme Court of the United States upon the question of discrimination." *Akins* v. *State*, 182 S. W. 2d 723. This reference to the holdings of the state and federal courts was to *Akens* v. *State*, 167 S. W. 2d 758, which reversed a previous conviction of petitioner on the authority of *Hill* v. *Texas*, *supra*. Although this opinion of the Court of Criminal Appeals does not refer to proportional racial representation on juries, recent decisions of that court had pre-

[2] Constitution, Fourteenth Amendment, Section 1: " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

viously disapproved that procedure. *Hamilton* v. *State*, 150 S. W. 2d 395, 400, r. c.; *Hill* v. *State*, 157 S. W. 2d 369, 373, l. c., reversed on other grounds; 316 U. S. 400. We think, therefore, that the conclusions of the state courts show that in their judgment there was no proven racial discrimination by limitation in this case. Otherwise there would have been a reversal by the Court of Criminal Appeals.

As will presently appear, the transcript of the evidence presents certain inconsistencies and conflicts of testimony in regard to limiting the number of negroes on the grand jury. Therefore, the trier of fact who heard the witnesses in full and observed their demeanor on the stand has a better opportunity than a reviewing court to reach a correct conclusion as to the existence of that type of discrimination. While our duty, in reviewing a conviction upon a complaint that the procedure through which it was obtained violates due process and equal protection under the Fourteenth Amendment, calls for our examination of evidence to determine for ourselves whether a federal constitutional right has been denied, expressly or in substance and effect, *Norris* v. *Alabama*, 294 U. S. 587, 589-90; *Smith* v. *Texas*, 311 U. S. 128, 130, we accord in that examination great respect to the conclusions of the state judiciary, *Pierre* v. *Louisiana*, 306 U. S. 354, 358. That respect leads us to accept the conclusion of the trier on disputed issues "unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process," *Lisenba* v. *California*, 314 U. S. 219, 238, or equal protection. Cf. *Ashcraft* v. *Tennessee*, 322 U. S. 143, 152, 153; *Malinski* v. *New York*, No. 367, this Term, slip opinion, p. 2.

The regular statutory practice for the selection of grand jurors was followed in this case. Under the Texas statutes jury commissioners appointed by the judge of the trial court select a list of sixteen grandjurymen from which list twelve are chosen as a grand jury. Texas Code of Criminal Procedure, Articles 333, 337. Qualifications for grandjurymen are set out in Article 339.[3] The Commissioners are instructed by the court as to their duties.

[3] Art. 339. "No person shall be selected or serve as a grand juror who does not possess the following qualifications:

"1. He must be a citizen of the State, and of the county in which he is to serve, and qualified under the Constitution and laws to vote in said county; but, whenever it shall be made to appear to the court that the requisite number of jurors who have paid their poll taxes can not be found within the

Art. 366. This method of selection leaves a wide range of choice to the commissioners. Its validity, however, has been accepted by this Court. *Smith* v. *Texas,* 311 U. S. 128, 130. Petitioner does not attack it now. Its alternative would be a list composed of all eligibles within the trial court's jurisdiction and selection of the panel by lot.

Petitioner's sole objection to the grand jury is that the "commissioners deliberately, intentionally and purposely limited the number of the Negro race that should be selected on said grand jury panel to one member." Fairness in selection has never been held to require proportional representation of races upon a jury. *Virginia* v. *Rives,* 100 U. S. 313, 322-23; *Thomas* v. *Texas,* 212 U. S. 278, 282. Purposeful discrimination is not sustained by a showing that on a single grand jury the number of members of one race is less than that race's proportion of the eligible individuals. The number of our races and nationalities stands in the way of evolution of such a conception of due process or equal protection. Defendants under our criminal statutes are not entitled to demand representatives of their racial inheritance upon juries before whom they are tried. But such defendants are entitled to require that those who are trusted with jury selection shall not pursue a course of conduct which results in discrimination "in the selection of jurors on racial grounds." *Hill* v. *Texas, supra,* 404. Our directions that indictments be quashed when Negroes, although numerous in the community, were excluded from grand jury lists have been based on the theory that their continual exclusion indicated discrimination and not on the theory that racial groups must be recognized. *Norris* v. *Alabama, supra; Hill* v. *Texas, supra; Smith* v. *Texas, supra.* The mere fact of inequality in the number selected does not in itself show discrimination. A purpose to discriminate must be present which may be proven by systematic exclusion of eligible jurymen of the proscribed race or by unequal application of the law to such an extent as to show intentional

county, the court shall not regard the payment of poll taxes as a qualification for service as a juror.

"2. He must be a freeholder within the State, or a householder within the county.

"3. He must be of sound mind and good moral character.

"4. He must be able to read and write.

"5. He must not have been convicted of any felony.

"6. He must not be under indictment or other legal accusation for theft or of any felony."

discrimination. Cf. *Snowden* v. *Hughes*, 321 U. S. 1, 8. Any such discrimination which affects an accused will make his conviction unlawful.

The history and record of this case gives evidence that the courts of Texas which are charged with the trial of petitioner endeavored to comply with the federal constitutional requirements as to the selection of grand juries, according to the interpretation of this Court in *Hill* v. *Texas, supra*. Not only did the Court of Criminal Appeals reverse a former conviction of petitioner on its authority but the judge, now deceased, of the criminal district court of Dallas instructed the three jury commissioners, who selected this grand jury list, as testified to by each of them, that there should be no discrimination against anyone because of his color.[4]

Hill v. *Texas, supra*, was decided June 1, 1942. The trial court has four terms a year—January, April, July and October. After the *Hill* decision, the jury commissioners who were appointed at the July 1942 term to select grand jurors for the October 1942 term, Texas Code of Criminal Procedure, Arts. 333 and 338, placed a Negro on the grand jury list although he did not serve. Under the instructions of the judge as just detailed, the commissioners for the January 1943 term, at which petitioner was indicted, placed a Negro on the list and he served as a grand juror. Prior to the decision in the *Hill* case, it does not appear that any colored person had ever served on a grand jury in Dallas County.

---

[4] Commissioner Wells: "In the selection of our panel of sixteen for the grand jury the way we determined whom we would put on that list was, we were advised by Judge Grover Adams that the Supreme Court had ruled that we could not discriminate against any one because of his color, as I recall, they had not been discriminating for selection on the grand jury panel; and in turn they said there were sixteen, and it would be further evident if we placed one among the twelve so as to make it clear."

Commissioner Tennant: "When the grand jury commissioners were appointed by Judge Adams the only thing I remember he said is that we could not discriminate against the negro population being represented on the grand jury. No, he just outlined if he could qualify as a grand juror. In this particular instance we selected one negro on this panel; so far as I am concerned, I read in the paper that the Supreme Court of the United States stated that a negro could sit on the grand jury. . . . Judge Adams never mentioned to us about putting one negro on the grand jury, or five or ten. Yes, that there must be representation for the race."

Commissioner Douglas: "At that time Judge Adams, the judge of this court made some reference or instructions about how to select the grand jury. He thought it well to select negroes on the grand jury. He said he thought it would be well to select a negro on the grand jury. There was no further discussion about that. We did select a negro on the grand jury. All three of us went out there to see him. We all went and talked to just one negro and that is the one we selected."

On the precise act of discrimination by the jury commissioners which is asserted by petitioner, that is the deliberate, intentional and purposeful limitation to one of the number of Negroes on the grand jury panel, the record shows as follows. About fifteen and one-half per cent of the population of Dallas County, Texas, is negro. A substantial percentage of them are qualified to serve as grand jurors. No exact comparison can be made between the white and negro citizens as to the percentage of each race which is eligible. On the strictly mathematical basis of population, a grand jury of twelve would have 1.8552 negro members on the average. Of course, the qualifications for grand jury service, note 3 *supra*, would affect the proportion of eligibles from the two races. As one member of the Negro race served upon the grand jury which indicted petitioner and one had appeared upon the other grand jury list which had been selected after the decision in *Hill* v. *Texas*, we cannot say that the omission from each of the two lists of all but one of the members of a race which composed some fifteen per cent of the population alone proved racial discrimination.

In connection with that fact of omission, we must appraise the testimony offered to show the intentional limitation. Besides the language quoted in note 4, *supra*, which relates particularly to the court's instructions, other relevant evidence of such intention is found only in the testimony of the commissioners. They made these statements as to their intentions:

Commissioner Wells: "There was nothing said about the number and nothing was said about the number on the panel. . . . We had no intention of placing more than one negro on the panel. When we did that we had finished with the negro. That was the suggestion of the others and what Judge Adams thought about the selection of the grand jury. . . . Judge Adams did not tell us to put one negro or five negroes on the grand jury. Yes, we just understood to see that negroes had representation on the grand jury, and we went out to see this particular one because we did not know him. . . . Among the white people whose names might go on the grand jury, unless I knew them personally and knew their qualifications, we went out and talked to them. No, we did not discriminate against a white man or a negro. I attempted not to."

Commissioner Tennant: "We three did not go to see any other negroes, that is the only one. I did not have any intention of putting more than one on the list; I could not think of anybody;

I would have if I could have thought of another one, and putting one on."

Commissioner Douglas: "Yes, sir, there were other negroes' names mentioned besides the one we selected; we did not go talk to them; we liked this one, and our intentions were to get just one negro on the grand jury; that is right. No, I did not have any intention of placing more than one negro on the grand jury. . . . We never agreed to select any certain number, but when we found one with all the qualifications of a grand juror we felt like that was satisfactory representation. . . . No, sir, we did not have in mind to put any set number of representatives of the various races. . . . We did not agree to put eleven negroes and one white man on, no. That is right, all that we were endeavoring to get a fair and impartial grand jury without any discrimination against any race on earth. We did not have in mind, or the other commissioners, to put any set number on of any race, white, yellow or what-not."

A careful examination of these statements in connection with all the other evidence leaves us unconvinced that the commissioners deliberately and intentionally limited the number of Negroes on the grand jury list. The judge who heard the witnesses on the motion to quash did not find that type of discrimination. The law of their state, the instructions of the judge, their oath of office required them to choose prospective jurors on their statutory qualifications and without regard to their color or the number of representatives of various races who might appear upon the list. We cannot say the commissioners violated these obligations.

This conclusion makes it unnecessary to decide whether a purposeful limitation of jurors by race to the approximate proportion that the eligible jurymen of the race so limited bears to the total eligibles is invalid under the Fourteenth Amendment.

The judgment is

Affirmed.

Mr. Justice Rutledge concurs in the result.

The Chief Justice and Mr. Justice Black dissent.

SUPREME COURT OF THE UNITED STATES.

No. 853.—October Term, 1944.

L. C. Akins, Petitioner, vs. The State of Texas. } On Writ of Certiorari to the Court of Criminal Appeals of the State of Texas.

[June 4, 1945.]

Mr. Justice Murphy, dissenting.

The equal protection clause of the Fourteenth Amendment entitles every person, whose life, liberty or property is in issue, to the benefits of grand and petit juries chosen without regard to race, color or creed. This constitutional principle is a fundamental tenet of the American faith in the jury system. The absence of such a principle would give free rein to those who wittingly or otherwise act to undermine the very foundations of this system and would make juries ready weapons for officials to oppress those accused individuals who by chance are numbered among unpopular or inarticulate minorities.

The State of Texas in this instance appears to have made a sincere effort to obey this constitutional mandate in selecting the grand jury which indicted the Negro petitioner. Until this Court's decision in 1942 in *Hill* v. *Texas*, 316 U. S. 400, no Negro ever served on a grand jury in Dallas County, Texas, where this case arose. In an attempt to comply with that decision the three jury commissioners were careful here to appoint one Negro to the sixteen-member grand jury panel; he qualified and served on the twelve-man jury. Thus it cannot be said that Texas has systematically and completely excluded Negroes from the grand jury. Cf. *Norris* v. *Alabama*, 294 U. S. 587; *Pierre* v. *Louisiana*, 306 U. S. 354; *Smith* v. *Texas*, 311 U. S. 128; *Hill* v. *Texas*, *supra*. But that fact alone does not guarantee compliance with the Fourteenth Amendment, however commendable may be the attempt. Racial limitation no less than racial exclusion in the formation of juries is an evil condemned by the equal protection clause. "The Amendment nullifies sophisticated as well as simple-minded modes of discrimination." *Lane* v. *Wilson*, 307 U. S. 268, 275. This case must therefore be reviewed with that in mind.

Petitioner, as a Negro, "cannot claim, as matter of right, that his race shall have a representation on the jury," *Neal* v. *Delaware*, 103 U. S. 370, 394, inasmuch as "a mixed jury in a particular case is not essential to the equal protection of the laws," *Virginia* v. *Rives*, 100 U. S. 313, 323. But petitioner, as a human being endowed with all the rights specified in the Constitution, can claim that no racial or religious exclusion, limitation or other form of discrimination shall enter into the selection of any jury which indicts or tries him.

It follows that the State of Texas, in insisting upon one Negro representative on the grand jury panel, has respected no right belonging to petitioner. On the contrary, to the extent that this insistence amounts to a definite limitation of Negro grand jurors, a clear constitutional right has been directly invaded. The equal protection clause guarantees petitioner not only the right to have Negroes considered as prospective veniremen but also the right to have them considered without numerical or proportional limitation. If a jury is to be fairly chosen from a cross section of the community it must be done without limiting the number of persons of a particular color, racial background or faith—all of which are irrelevant factors in setting qualifications for jury service. This may in a particular instance result in the selection of one, six, twelve or even no Negroes on a jury panel. The important point, however, is that the selections must in no way be limited or restricted by such irrelevant factors.

In this case the State of Texas has candidly admitted before us "that none of the three [jury commissioners] intended to place more than one Negro upon the grand jury drawn by them." Commissioner Wells testified that "We had no intention of placing more than one Negro on the panel. When we did that we had finished with the Negro." In the words of Commissioner Tennant, "We three did not go to see any other Negroes, that is the only one. I did not have any intention of putting more than one on the list." Finally, as Commissioner Douglas stated, "Yes, sir, there were other Negroes' names mentioned besides the one we selected; we did not go talk to them; we liked this one, and our intentions were to get just one Negro on the grand jury; that is right. No, I did not have any intention of placing more than one Negro on the grand jury."

Clearer proof of intentional and deliberate limitation on the basis of color would be difficult to produce. The commissioners' declarations that they did not intend to discriminate and their other inconsistent statements cited by the Court fade into insignificance beside the admitted and obvious fact that they intended to and did limit the number of Negroes on the jury panel. By limiting the number to one they thereby excluded the possibility that two or more Negroes might be among the persons qualified to serve. All those except the one Negro were required to be of white color. At the same time, by insisting upon one Negro, they foreclosed the possibility of choosing sixteen white men on the panel. They refused, in brief, to disregard the factor of color in selecting the jury personnel. To that extent they have disregarded petitioner's right to the equal protection of the laws. To that extent they have ignored the ideals of the jury system. Our affirmance of this judgment thus tarnishes the fact that we of this nation are one people undivided in ability or freedom by differences in race, color or creed.